Supreme Court, U.S.
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No. 96-292

In The

Supreme Court of the United States

October Term, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

1. When a state trial court denies defendants' motion to dismiss or motion for summary judgment brought on the basis of qualified immunity under 42 U.S.C. § 1983, do defendants have a federal right to immediate appellate review of the qualified immunity defense in the appropriate state appellate court before discovery and trial?

PARTIES TO THE PROCEEDING

The Idaho State Liquor Dispensary was an additional party to the proceeding before the Idaho district court, but was dismissed as a party by the Idaho district court. Therefore, the Idaho State Liquor Dispensary was not a party to the appeal dismissed by the Idaho Supreme Court and is not a party to the proceeding before this Court. The remaining parties to the proceeding are listed in the caption.

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JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257, which provides "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any . . . immunity is . . . claimed under the . . . statutes of . . . the United States." The petition for certiorari was granted from a decision of the Supreme Court of Idaho, which is the highest court of Idaho, dismissing Petitioners' appeal from a state trial court denial of their motion to dismiss on the ground of qualified immunity under 42 U.S.C. § 1983. The petition for certiorari was timely filed with this Court on August 20, 1996, from the denial of the Petitioners' motion for rehearing on May 23, 1996, 89 days after the entry of the order denying the petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, cl. 2 of the Constitution of the United States (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Idaho Appellate Rule 11(a) provides:

Rule 11. Appealable judgments and orders.

An appeal as a matter of right may be taken to the Supreme Court [of Idaho] from the following judgments and orders:

(a) Civil Actions. From the following judgments and orders of a district court in a civil action:

(1) Judgments, orders and decrees which are final, including orders of the district court granting or denying peremptory writs of mandate and prohibition.

(2) Decisions by the district court dismissing, affirming, reversing or remanding an appeal.

(3) Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(4) Any contempt order or judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(5) An order granting or refusing a new trial, including such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur.

(6) An order granting or denying a motion for judgment notwithstanding the verdict.

(7) Any order made after final judgment including an order denying a motion to set aside a default judgment, but excluding an order granting a motion to set aside a default judgment.

STATEMENT OF THE CASE

On August 2, 1992, Plaintiff-Respondent Kristine L. Fankell was appointed to a probationary position as a liquor store clerk for the Idaho Liquor Dispensary, an agency of the State of Idaho. J.A. 6. In late March, 1993, Respondent's job performance was rated at "below expectation." J.A. 7. She filed a grievance from the performance evaluation on April 2, 1993. *Id.* On April 7, 1993, she was notified that because she had failed to satisfactorily complete her probationary period, she would be given the option to resign without prejudice or, if she declined to resign, her employment would be terminated. *Id.* She did not resign, and her employment was terminated on April 22, 1993. *Id.*

On April 11, 1995, Respondent Fankell filed suit in Idaho's First District Court.[1] Her first amended complaint, filed shortly thereafter, contained two counts, both under 42 U.S.C. § 1983. The first count contended there were violations of her substantive due process rights when her employment was terminated; the second, that there were violations of her procedural due process rights when her grievance was not addressed. J.A. 7, 9. The complaint sought damages, including punitive damages, and injunctive relief. J.A. 10-12.

The first amended complaint named as Defendants four individuals and the Idaho State Liquor Dispensary (the Dispensary). The four individuals were Respondent's immediate supervisor Johnson and higher ranking officers or employees of the Dispensary up to and including Superintendent Summers. J.A. 3-4. The four individual Defendants are the four Petitioners in this Court.

The Defendants did not answer the complaint, but instead moved to dismiss under Idaho Rule of Civil Procedure 12(b)(6). J.A. 14. The Dispensary raised its status as a state agency as a defense, contending that a state agency is not a person who can be sued under 42 U.S.C. § 1983. J.A. 33-34. The four individual Defendants raised qualified immunity as their defense, contending that they

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[1] Idaho's statute of limitations for cases brought under 42 U.S.C. § 1983 is the two-year statute of limitations for torts provided by Idaho Code § 5-219(4). See *Henderson v. State*, 110 Idaho 308, 311, 715 P.2d 978, 981 (1986), *cert. denied*, 477 U.S. 907, 106 S. Ct. 3282, 91 L. Ed. 2d 571 (1986). Respondent's suit was timely filed.

had not violated any clearly established law in derogation of Respondent's rights. J.A. 23-31.

The key to Petitioners' argument in their brief supporting their qualified immunity defense depended on the interplay of state and federal law. Petitioners' starting assumption was that an employee who had not completed her probationary period did not yet have a state-created liberty or property interest in continued employment that would trigger due process requirements before termination of employment. Petitioners explained that the Idaho law setting forth when the probationary period ended and when a new employee like Plaintiff-Respondent could acquire a protectible liberty or property interest in her employment was unclear at the time of termination of her employment. They argued that Idaho Code § 67-5309(j) then set the probationary period at six months, that the Idaho State Personnel Commission rule 28.15.A.2.a[2] interpreted this statutory provision to mean 1,040 hours of work (*i.e.*, twenty-six forty-hour work weeks), and that the Idaho Supreme Court did not reconcile the potential conflict between the statute's use of months and not hours and the rule's use of hours until the year after termination of Plaintiff-Respondent's employment. See *Hood v. Idaho Dept. of Health & Welfare*, 125 Idaho 151, 153, 868 P.2d 479, 481 (1994), which held that the rule setting the probationary period at 1,040 hours erroneously construed the statute and that probationary periods end after six months regardless of the

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[2] The official citation to this rule is IDAPA 28.15.A.2.a. IDAPA is an acronym for Idaho Administrative Procedure Act.

number of hours worked.[3] Petitioners argued that they reasonably relied upon the administrative rule in place at the time that Respondent's employment was terminated to determine whether Respondent had a protectible liberty or property interest in continued employment, so they had not violated clearly established law when her employment was terminated without further process of law, and, therefore, they were entitled to qualified immunity in a suit brought under 42 U.S.C. § 1983. J.A. 28-31.

Regarding the procedural due process claim, Petitioners argued that it was not a clearly established right, at the time of Respondent's termination, that she had a property interest in her employment, requiring due process prior to the termination. J.A. 59-60. Under the rule in place at the time Respondent was terminated, she was a probationary employee, and there were no liberty or property interests requiring federal due process protections. *Id.*

The trial court treated the motion to dismiss as a motion for summary judgment because affidavits had been filed in connection with consideration of the motion and denied Petitioners' motion from the bench, although it did grant the Dispensary's motion to dismiss. On February 23, 1996, the trial court filed a written order

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[3] The *Hood* decision was issued on February 9, 1994. The statute was amended to provide a 1,040-hour probationary period and the amendment signed into law by Governor Andrus on March 31, 1994. See 1994 Idaho Sessions Laws, ch. 294. Thus, the Idaho Legislature restored the Idaho Personnel Commission's understanding of the law within fifty days after *Hood* was issued.

summarily denying Petitioners' portion of the motion without explanation. J.A. 62-63.

Petitioners timely filed a notice of appeal to the Idaho Supreme Court appealing "from that portion of the Order . . . rejecting [Petitioners'] defense of qualified immunity under 42 U.S.C. § 1983."[4] J.A. 64-66. The Idaho Supreme Court *sua sponte* issued a cursory order dismissing the appeal "for the reason that it is not from a final order or judgment" under Idaho Appellate Rule 11.[5] J.A. 67. Petitioners petitioned for rehearing and provided a memorandum briefing the issue of the finality of and immediate appealability of trial court denials of motions that raise a defense of qualified immunity under 42 U.S.C. § 1983. J.A. 69-83. The Idaho Supreme Court issued an order denying the petition for rehearing. J.A. 84. Petitioners timely petitioned for a writ of certiorari, which was granted. ___ U.S. ___, 117 S. Ct. 356, 136 L. Ed. 2d ___ (October 21, 1996).

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[4] Idaho Appellate Rule 14(a) allows appeal "within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment, order or decree of the district court appealable as a matter of right in any civil or criminal action." The appeal was filed with the district court on April 4, 1996, forty-one days after the date of the filing stamp on the district court's order. J.A. 64.

[5] The Idaho Supreme Court's orders in this case were issued under the name of the clerk of the court, much like Petitioners were notified in this case that their petition for a writ of certiorari had been granted by a letter from the clerk of the court.

SUMMARY OF ARGUMENT

Qualified immunity is a defense that Congress intended to be available in § 1983 cases. It is the nature of qualified immunity – an immunity not only from liability, but also from trial and the other burdens of litigation for discretionary actions taken in areas in which there is no clearly established law – that makes qualified immunity a substantive right. Because qualified immunity is an immunity from suit rather than a defense to liability, it is effectively lost if a case is erroneously permitted to go to trial. A pretrial order denying a motion to dismiss or motion for summary judgment on grounds of qualified immunity is a final decision that is immediately appealable under federal law because without immediate appellate review, the qualified immunity entitlements not to stand trial and not to bear the burdens of litigation are lost when a qualified immunity motion is erroneously denied.

Idaho's appellate rules provide for appeal as a matter of right from "[j]udgments, orders and decrees which are final," but the Idaho Supreme Court declined to accept the finality of an order denying a qualified immunity motion in this § 1983 case. It therefore denied immediate appellate review of a trial court order denying a qualified immunity motion. Given this Court's unambiguous holdings that denial of a qualified immunity motion is final, the Idaho Supreme Court must accept and apply the federal definition of finality under Idaho's appellate rules, and the Idaho Supreme Court must take an appeal as a matter of right from denial of a qualified immunity motion because the denial is an order or decree that is

final, which is the standard of Idaho's own appellate rules.

In the alternative, if the Idaho Supreme Court is not required by federal law to accept the federal definition of finality in construing its own appellate rules when it hears a § 1983 case, Idaho's state law determination that orders denying qualified immunity motions are not appealable should be pre-empted to preserve the benefits of this federal defense. Idaho has no valid excuse not to apply the federal law of immediate appeal of denial of a qualified immunity motion. First, denial of immediate appeal from a qualified immunity motion does not merely burden the benefits of qualified immunity (avoiding trial and the burdens of litigation), it extinguishes them altogether when the trial court has ruled erroneously. Second, denial of immediate appeal is an obstacle to implementing the Congressional policy that qualified immunity will be retained. Third, denial of immediate appeal leads to different results depending whether the suit is brought in a state or federal forum. Fourth, denial of immediate appeal discriminates against this federal category of a collateral order when appeal is allowed from several state categories of collateral order. Finally, failing to pre-empt the state law rule denying the immediate appeal would leave § 1983 defendants on a different playing field from § 1983 plaintiffs because § 1983 plaintiffs have the benefit of decisions pre-empting state procedures that burden their federal rights, *e.g.*, notice-of-claim statutes or local rules of governmental immunity. Idaho's appellate rule that denies the federal right of appeal from denial of a qualified immunity

motion should be pre-empted to preserve immunities available to § 1983 defendants under federal law.

In conclusion, by requiring Idaho to give the federal meaning of finality to orders and decrees when it hears a § 1983 case, or by pre-empting restrictions on appellate jurisdiction that deny defendants the benefits of federal immunities, Idaho should hear an appeal from the denial of a qualified immunity motion.

ARGUMENT

Trial courts in every State in the Union hear cases brought under 42 U.S.C. § 1983, and appellate courts of every State in the Union hear appeals from trial court decisions in these cases. See Appendix I to this brief. Qualified immunity is probably the most important defense to the thousands of state actors each year sued in state courts under § 1983 because when it is successfully invoked, it not only shields them from liability, it also shields them from the burdens of litigation and trial.[6]

[6] The law of qualified immunity has developed both in suits brought against federal officers and employees under the Constitution itself and in suits brought against state officers and employees under § 1983. The Court has said it would be "untenable to draw a distinction for purposes of immunity law" between the two types of suits. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n.30, 102 S. Ct. 2727, 2738, n.30, 73 L. Ed. 2d 396 (1982), citing *Butz v. Economou*, 438 U.S. 478, 504, 98 S. Ct 2894, 2909, 57 L. Ed 2d 895 (1978). Accordingly, this brief cites the immunity law of § 1983 interchangeably with the immunity law of suits against federal officers or employees brought directly under the Constitution.

Moreover, this defense is critically important to the effective functioning of state and local government for at least three reasons: It protects reasonable actions undertaken by public officers from attacks that would otherwise undermine the necessary exercise of governmental discretion, it prevents the disruption of government by litigation that would second-guess discretionary actions that did not violate clearly established law, and it encourages people to serve in government by providing an objective defense to challenges to their reasonable actions. This case will determine whether § 1983 defendants sued in state courts have a right to immediate appellate review of denial of their qualified immunity motions or whether they are subject to the whim of varying state appellate procedures when seeking to preserve the benefits of their qualified immunity defense after denial of a qualified immunity motion.

I.

PRETRIAL DENIAL OF A QUALIFIED IMMUNITY MOTION IS A FINAL DECISION FROM WHICH DEFENDANTS HAVE AN IMMEDIATE FEDERAL RIGHT TO APPEAL IN ORDER TO VINDICATE THE BENEFITS OF QUALIFIED IMMUNITY – AVOIDANCE OF TRIAL AND THE BURDENS OF LITIGATION

There is no doubt about the premises of qualified immunity law central to this appeal. First, Congress intended qualified immunity to be an available defense in § 1983 cases: "Congress did take common-law principles into account in providing certain forms of absolute and qualified immunity." *Howlett v. Rose*, 496 U.S. 356, 383, 110 S. Ct. 2430, 2446, 110 L. Ed. 2d 332 (1990). Just as

Congress intended a remedial purpose to § 1983, it intended that public officers who acted reasonably and in good faith would be immune from suit. *E.g., Wood v. Strickland*, 420 U.S. 308, 316, 95 S. Ct. 992, 998, 43 L. Ed. 2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48, 94 S. Ct. 1683, 1692, 40 L. Ed. 2d 90 (1974), both cited in *Howlett*, 496 U.S., at 383, 110 S. Ct., at 2446-47.

Second, it is the nature of qualified immunity – an immunity from suit and the other burdens of litigation for discretionary actions taken in areas in which there is no clearly established law, as well as immunity from liability – that makes qualified immunity a *substantive* right to be free of these burdens, not a *procedural* one. *Mitchell v. Forsyth*, 472 U.S. 511, 525-26, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985), explained:

> The conception animating the qualified immunity doctrine . . . is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" . . . [T]he "consequences" with which we were concerned in *Harlow* are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquiries of this kind can be peculiarly disruptive of effective government."

> With these concerns in mind, the *Harlow* Court refashioned the qualified immunity doctrine in such a way as to "permit the resolution of many insubstantial claims on summary judgment" and to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery" in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.

(Citations omitted.) Given qualified immunity's protection for government employees who must frequently navigate in uncharted waters where the "correct" legal answer is not clear, *Mitchell* explained: "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.*, at 526, 105 S. Ct., at 2815.

Third, a pretrial order denying a qualified immunity motion is a final decision that is immediately appealable under federal law.[7] This principle was also established in

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[7] "Final decision" is the term used in 28 U.S.C. § 1291, the federal appellate statute, to describe appealable district court rulings. This Court has construed "final decision" to be more encompassing than "final judgment" under the collateral order doctrine of *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), and its progeny. This brief uses the term "final decision" to describe rulings appealable under federal statute, including those preceding final judgments. "Judgments, orders and decrees which are final" are the terms used in Idaho Appellate Rule 11(a)(1) to describe one category of appealable district court rulings. This brief uses the term "final order" to describe rulings preceding final judgment in state court and denying a qualified immunity motion under 42 U.S.C. § 1983.

Part III of *Mitchell*, 472 U.S., at 524-30, 105 S. Ct., at 2814-17, where the Court concluded that pretrial orders denying a qualified immunity motion fit into the category of immediately appealable collateral orders described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 2d 1528 (1949). This holding was reiterated last term in *Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S. Ct. 834, 839, 133 L. Ed. 2d 773 (1996): "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at either the dismissal stage or the summary-judgment stage is a 'final' judgment subject to immediate appeal."

Fourth, denial of a qualified immunity motion is a final decision immediately appealable under the collateral order doctrine because without the right to immediate appellate review, the qualified immunity entitlements not to stand trial and not to bear the burdens of litigation are lost if a qualified immunity motion is erroneously denied. *Behrens*, ___ U.S., at ___, 116 S. Ct., at 838; *Mitchell*, 472 U.S., at 528, 105 S. Ct., at 2815. As *Mitchell* elaborated: "A major characteristic of the denial or granting of a claim appealable under *Cohen's* collateral order doctrine is that unless it can be reviewed before the proceedings terminate, it can never be reviewed at all." *Id.*, at 525, 105 S. Ct., at 2814-15 (citation and internal punctuation omitted). Loss of the right to appeal from erroneous denial of a qualified immunity motion results in loss of the substantive benefits of qualified immunity. That is why the right to an immediate appeal to protect qualified immunity is closely tied, indeed, inseparable, from the substantive right itself.

Despite these precedents, there are state appellate courts, including the Idaho Supreme Court, that refuse to allow immediate appellate review of trial court denials of qualified immunity motions. See n.4, Petitioners' Brief on Petition for a Writ of Certiorari, pp. 4-5. This is so even though Idaho's and every other States' appellate courts not only hear § 1983 appeals, but they also hear interlocutory appeals from trial court decisions and orders preceding final judgment in a variety of other subject matter areas. See Appendix II to this brief. Idaho courts, having opened their doors to § 1983 claims and having the authority to allow interlocutory appeals in a variety of subject matter areas, should not be allowed to deny immediate appeal of a trial court's denial of a qualified immunity motion and thereby effectively extinguish § 1983 defendants' most important federal defense – the defense that entitles the defendants to be freed of the burdens of litigation and trial.

II.

IDAHO LAW PROVIDES FOR APPEAL AS A MATTER OF RIGHT OF JUDGMENTS, ORDERS AND DECREES THAT ARE FINAL, AND IDAHO MUST ACCEPT THE FEDERAL DEFINITION OF FINALITY IN CASES BROUGHT UNDER 42 U.S.C. § 1983

Idaho district courts are courts of general jurisdiction,[8] and the Idaho Supreme Court has jurisdiction to

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[8] Article V, § 20, of the Idaho Constitution provides: "**Jurisdiction of district court.** – The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law."

review the district courts' decisions.[9] Idaho courts have thus opened their doors through their general jurisdiction to both state and federal cases. When they hear cases brought under 42 U.S.C. § 1983, Idaho courts, like all state courts, must apply federal rules of substantive law. *Howlett*, 496 U.S., at 377-78, 110 S. Ct., at 2443-44. The "elements of, and defenses to, a federal cause of action are defined by federal law," and cannot be altered by a State. *Id.*, at 375, 110 S. Ct., at 2442. Moreover, not only are States prohibited from altering the defenses to a § 1983 action, when they hear a § 1983 claim, they are obligated to "proceed in such manner that all the substantial rights of the parties under controlling federal law are protected," and federal policy is not displaced. *Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 2313-14, 101 L. Ed. 2d 123 (1988), quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S. Ct. 246, 251, 87 L. Ed. 239 (1942) (internal punctuation omitted).

Petitioners' assertion of a right to appeal denial of their qualified immunity motion is the assertion of the substantive right elucidated in *Mitchell* and *Behrens* and similar cases – the right not to go to trial and not to suffer the job- and governmental-disrupting burdens of discovery on a case that may be defeated on qualified immunity grounds at a later stage. Without the right to immediate

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[9] Article V, § 9, of the Idaho Constitution provides: "**Original and appellate jurisdiction of the Supreme Court.** – The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof, ..."

appellate review, these central benefits of qualified immunity are forever lost to the Petitioners.

When state courts hear a § 1983 case, whatever interpretation they may give to a term like "final order" in other contexts, they are required by *Mitchell* and *Behrens* to accept the federal determination of finality regarding denial of a qualified immunity motion. State courts cannot extinguish qualified immunity's substantive benefits of freedom from the burdens of litigation available to those asserting this federal defense by relying on local rules to redefine what is or is not a final order in a § 1983 case. The policies underlying finality and immediate appealability of an order denying qualified immunity are no less substantive in state courts, and state courts are obligated to proceed in a manner that the federal defense and the policies it protects remain intact.

In this regard, Petitioners emphasize that those litigating before Idaho's district courts have the right to appeal to the Idaho Supreme Court from a variety of prejudgment orders. Idaho Appellate Rule (I.A.R.) 11(a) provides that appeals may be taken "as a matter of right" from "judgments, *orders* and decrees *which are final.*"[10]

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[10] Petitioners are focusing in this case before the Supreme Court of the United States on their claim that they may appeal to the Idaho Supreme Court *as a matter of right* from the Idaho district court's denial of their qualified immunity motion, not upon the *possibility of permissive appeal* to the Idaho Supreme Court. Idaho Appellate Rule 12(a) allows permissive appeal from an interlocutory order. However, the Idaho Supreme Court "intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11." *Buddell v.*

(Emphasis added.) Likewise, litigants have a right to appeal from other categories of orders preceding final judgment, including "[a]n order granting . . . a new trial," I.A.R. 11(a)(5); "[a]ny order . . . reducing a charge of criminal conduct over the objection of the prosecutor," I.A.R. 11(c)(5), or "[a]n order granting a motion to suppress evidence," I.A.R. 11(c)(8).

A state court's obligation to apply federal law and to exercise its appropriate jurisdiction over federal cases is of long-standing recognition. In *Mondou v. New York, N.H.&H.R.R.Co.*, 223 U.S. 1, 57-58, 32 S. Ct. 169, 177-78, 56 L. Ed. 2d 327 (1912), the Court held that Connecticut courts could not refuse to hear cases under the Federal Employers' Liability Act (FELA) simply because Connecticut disagreed with Congressional labor policy, stating that Congressional "policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state," and, further, that the "existence of jurisdiction creates a duty to exercise it." Likewise, in *Testa v. Katt*, 330 U.S. 386, 394, 67 S. Ct. 810, 815, 91 L. Ed. 967 (1947), the Court concluded that because Rhode Island courts had "adequate and appropriate" jurisdiction to hear cases

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Todd, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983) (the court dismissed a permissive appeal from the denial of a summary judgment motion that had been certified by the trial court). It is likely that either or both of the Idaho district court or Idaho Supreme Court would have denied a motion for permissive appeal in this case under *Buddell's* guidance. More importantly, *permissive appeals* do not vindicate rights, and Petitioners are asserting a right of appeal from a trial court denial of a qualified immunity motion.

under state law similar to cases under the Federal Emergency Price Control Act, Rhode Island's courts could not refuse to entertain cases and enforce the latter law. *Mondou* and *Testa* were among the precedents cited by the Court in *Howlett* to hold that Florida courts of general jurisdiction must accept the federal law that local school districts and their officers are not entitled to sovereign immunity when sued under § 1983 and must provide a forum for those suits. 496 U.S., at 377-78, 110 S. Ct., at 2444.

The Idaho Supreme Court has appropriate and adequate appellate jurisdiction to protect the federal right at stake here. As well as express appellate jurisdiction over several categories of state-law pre-judgment orders, it has appellate jurisdiction over "judgments, orders and decrees" of the district court "which are final," and federal law is clear that denials of qualified immunity motions are final actions. The Idaho Supreme Court is therefore obligated, when presented with an appeal from such an order, to proceed in a manner that protects the federal right and preserves the underlying federal policy of review of those decisions to preserve immunity from trial and the burdens of litigation. The Idaho Supreme Court's definition of its appellate jurisdiction to include "orders and decrees which are final" requires it to apply the federal definition of finality and accept the appeal because it meets the federal definition of a final order or decree. Because Idaho has opened its state trial and appellate courts to § 1983 litigation, the Idaho Supreme Court is required to exercise its appellate jurisdiction in a manner that protects the federal rights of the parties

before it and to accept as "final" for appellate purposes the denial of a qualified immunity motion under § 1983.

III.

IF IDAHO CONSTRUES ITS APPELLATE RULES TO REJECT THE COLLATERAL ORDER DOCTRINE'S APPLICATION TO § 1983 CASES, THE APPELLATE RULES SHOULD BE PRE-EMPTED

Assuming for the sake of argument that the Idaho Supreme Court is not obligated to follow federal law in determining the "finality" of pre-judgment orders in § 1983 cases when it construes the meaning of "final" in its own appellate rules, that does not mean that the Idaho Supreme Court's dismissal of Petitioners' appeal should stand. In *Howlett*, the Court noted: "A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.' " 496 U.S., at 369, 110 S. Ct., at 2439. A valid excuse can include neutral procedural rules and neutral rules regarding administration of the state courts, *id.*, at 372, 110 S. Ct., at 2441, but, "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse," *id.*, at 371, 110 S. Ct., at 2440. The "valid excuse" principle does not apply here for two reasons. First, the Idaho Supreme Court is not applying a neutral rule, and second, even if it were, that rule should be pre-empted because of its burden on a substantive federal right.

To begin, dismissal of an appeal from denial of a qualified immunity motion is not the neutral application

of a procedural rule.[11] The Idaho Supreme Court takes other types of interlocutory appeals as a matter of right, including appeals from orders granting a new trial, appeals from orders suppressing evidence in criminal cases, and appeals from orders reducing criminal charges. *See* Idaho Appellate Rule 11. All of these are, to use the term of art in federal law, "collateral orders" because if they are not reviewed before trial, as a practical matter they cannot be effectively reviewed at all.[12] Denial of Petitioners' immediate appeal does not reflect an across-the-board state policy never to take appeals before final judgment from collateral orders; instead, denial of the appeal discriminates against the federal right and undermines the federal policy at stake in appeals from collateral orders in § 1983 cases.

As importantly, even if the dismissal of the appeal did reflect a neutral state rule regarding the timing of appeals and appeals from collateral orders, that rule should be federally pre-empted. While the general principle is that parties take the state courts as they find them,

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[11] Indeed, Petitioners argued in Part II that it was the denial of the provisions of a neutral procedural rule, not the application of a neutral procedural rule.

[12] An order granting a new trial is, of course, effectively unreviewable if the new trial is held before the appellate court has an opportunity to determine whether a new trial could or should have been granted. Orders suppressing evidence in criminal cases or reducing criminal charges are in most cases effectively unreviewable after trial because double jeopardy protections will prevent a retrial using the suppressed evidence or under a higher charge. All three kinds of review would be called collateral order review if Idaho courts used the federal terminology.

procedural rules and policies can be preempted in order to protect a substantial federal right. For example, *Felder* set aside a Wisconsin notice-of-claim requirement on the grounds that it impermissibly burdened a § 1983 plaintiff's case:

> [W]here state courts entertain a federally created cause of action, the "federal right cannot be defeated by the forms of local practice." The question . . . is essentially one of pre-emption: is the application of the State's notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead " 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' "? Under the Supremacy Clause . . . , "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Because the notice-of-claim statute . . . conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is preempted when the § 1983 action is brought in a state court.

487 U.S., at 138, 108 S. Ct., at 2306-07 (citations omitted). The Court here has a situation like *Felder's*, except this time the defendants' rights are lost. The Idaho Supreme

Court's dismissal of Petitioners' appeal conflicts with the federal policy of protecting defendants' qualified immunity rights, and it will frequently and predictably produce different outcomes based solely on whether the defense is asserted in state or federal court. Therefore, the Supremacy Clause demands that the Idaho appellate rule must fall.

Felder was based on a line of cases in which this Court had set aside State procedural rules or policies that too heavily burdened the federal rights at stake. Much of the earlier precedent involved cases brought under FELA, the most significant of which was *Dice v. Akron, C.&Y.R.R.*, 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952). *Dice* held that a factual issue in a FELA case tried in Ohio state courts had to be sent to a jury and not tried by a judge (which would have been the case under Ohio law) because state procedure had to yield to Congress's prescription that the particular issues in question were to be tried by a jury. *Id.*, at 363, 72 S. Ct., at 315. Other FELA cases include *El Paso & N.R.Co. v. Gutierrez*, 215 U.S. 87, 92, 30 S. Ct. 21, 23, 54 L. Ed. 106 (1909) (rejecting a territorial statute's notice of claim requirement before bringing a FELA action); *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 512, 35 S. Ct 865, 868, 59 L. Ed. 1433 (1915) (holding that a state rule that plaintiff must prove that he was not contributorily negligent cannot apply in a FELA action brought in state court because Congress preferred the federal rule that the defendant must prove the plaintiff's contributory negligence); and *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949) (rejecting a Georgia pleading rule to construe pleadings most strongly against the pleader that resulted

in the dismissal of a federal lawsuit under pleading standards not applicable to FELA).

In addition to FELA cases, in *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143 (1923), the Court refused to let a state apply its local practice that waived a federal venue defense because the waiver defeated the federal defense. And, in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942), a state court action under the Jones Act, this Court rejected a State policy placing on the plaintiffs the burden of proof regarding the validity of releases:

> The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right originates. . . . [I]n trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Id., at 245, 62 S. Ct., at 251 (footnotes omitted).[13]

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[13] While the following two cases were not initiated in state court, in *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), this Court held that

When this Court set aside the Wisconsin notice-of-claim requirement in *Felder*, it expressed several concerns. One was that the notice-of-claim requirement burdened a substantial federal right in a manner not present in federal court. 487 U.S., at 141, 108 S. Ct., at 2308. Another was that the notice-of-claim requirement stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, at 151, 108 S. Ct., at 2313. A further concern was that the notice-of-claim requirement undermined uniformity; it would "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim was asserted in state or federal court." *Id.*, at 141, 108 S. Ct., at 2308. Also, the notice-of-claim statute discriminated against a federal right because tort plaintiffs in Wisconsin normally had two years to file their claims, not merely four months. *Id.*, at 141-42, 108 S. Ct., at 2308. Each of these four concerns is also present here.

First, a state court's denial of an immediate appeal burdens the federal immunity. Indeed, it does more than merely burden the right to avoid the burdens of litigation and trial, it extinguishes them. In *Felder*, the notice-of-claim requirement, while it burdened a federal right at stake, could be fulfilled. Here, if a trial court rules erroneously and an immediate appeal is denied, the immunity against trial and discovery is lost, and, unlike the

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exhaustion of state administrative remedies could not serve as a prerequisite to a § 1983 claim, and in *Burnett v. Gratton*, 468 U.S. 42, 104 S. Ct. 2924, 82 L. Ed. 2d 36 (1984), this Court determined a six-month state statute of limitations could not be applied to a § 1983 claim.

notice-of-claim requirement, there are no other steps the § 1983 defendants could have taken to retrieve or protect the right. The entitlement is defeated simply because of the forum in which the litigation was entertained.

Second, it is also apparent that the denial of a right of appeal from rejection of a qualified immunity motion is an obstacle to implementing Congressional policy of continuing qualified immunity. The qualified immunity defense is crucial to state and local government generally. As this Court recognized in *Mitchell*, 472 U.S., at 525, 105 S. Ct., at 2815, the quick resolution of § 1983 claims protects state and local government from the cost and disruption of its public officers undergoing discovery and trial. Also, by protecting the reasonable decisions and actions of public officers, their independent exercise of discretion is not chilled, and the public interest is better served. *Id.* In state courts where the qualified immunity entitlement is undermined or lost, so too is the ability of state or local government to serve the public needs.

When a state court undermines or eliminates the benefits of qualified immunity, a Congressional policy is defeated. Congress "[took] common-law principles into account in providing certain forms of absolute and qualified immunity" in enacting 42 U.S.C. § 1983. *Howlett*, 496 U.S., at 383, 110 S. Ct., at 2446. Likewise, "the elements of, and the defenses to, a federal cause of action are defined by Federal law," *id.*, at 375, 110 S. Ct., at 2442, and state courts cannot "nullify for their own people the legislative decisions that Congress has made on behalf of all the People," *id.*, at 383, 110 S. Ct., at 2447. Just as Congress intended a remedial purpose in enacting § 1983, Congress also made the decision that qualified immunity would be a federal defense to a § 1983 claim. It did so because of

the belief that "the public interest requires decisions and action to enforce laws for the protection of the public" and that "[i]mplicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide to act at all." *Scheuer v. Rhodes*, 416 U.S. 232, 241, 242, 94 S. Ct. 1683, 1689, 1689, 40 L. Ed. 2d 90 (1974). When a state court system hears § 1983 claims and refuses to proceed in a manner that protects the federal qualified immunity defense, it undermines or eliminates the Congressional policy behind the decision to allow qualified immunity and defeats Congressional intent.

Third, the Idaho Supreme Court's decision to reject an immediate appeal of a trial court's denial of a qualified immunity motion creates a different outcome in § 1983 litigation depending upon the forum in which the case proceeds, state or federal district court. In *Felder*, 487 U.S., at 153, 108 S. Ct., at 2314, this Court was concerned with principles of uniformity in § 1983 litigation, holding that a "[state] law that predictably alters the outcome of § 1983 claims depending solely on whether they were brought in state or federal court within the same State is obviously inconsistent with the federal interest in intrastate uniformity." Here, if a state trial court erroneously denies a qualified immunity motion, whether or not that entitlement is irretrievably lost depends solely on the forum in which the case is proceeding. This creates inconsistency not only between federal and state forums, but also between those state forums that allow an immediate appeal and those that do not. In those States, like Idaho,

in which immediate appeal is denied, the state forum can provide a windfall for § 1983 plaintiffs who are the beneficiaries of erroneous rulings denying qualified immunity motions.

This issue becomes more marked when the burgeoning number of § 1983 claims is considered. In 1961, fewer than 300 cases were brought in federal court under all the civil rights acts. Twenty years later, in 1981 alone, nearly 32,000 suits were filed. P. Low and J. Jeffries, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS, p. 854 (1987). Every state court system today hears § 1983 cases. *Howlett*, 496 U.S., at 378, n.20, 110 S. Ct., at 1044, n.20; see Appendix I of this brief. This escalating number of cases creates a pressing need for uniformity in § 1983 litigation. When state courts do not respect the full scope of federal § 1983 defenses, the incentive for removal of cases to federal courts is enhanced: "More importantly, were we to withhold the right of appeal in courts of this Commonwealth, the practical effect would be to ensure that a large number of suits under § 1983 would be removed to federal court." *Breault v. Chairman of the Board of Fire Comm. of Springfield*, 401 Mass. 26, 31, n.6, 513 N.E.2d 1277, 1281, n.6 (1987).

Fourth, as in *Felder*, Idaho's policy discriminates against a federal right. The Idaho Supreme Court exercises appellate jurisdiction over a variety of pretrial orders that are similar to collateral orders under federal law. See I.A.R. 11. The Idaho Supreme Court thus hears interlocutory appeals from a variety of pretrial orders, and it has the adequate and appropriate appellate jurisdiction to hear this case. Under the principles articulated in *Felder* and *Howlett*, the Idaho Supreme Court should

exercise its appellate jurisdiction and proceed in a manner that protects the substantial federal right at stake here.

Finally, there is another sort of inequality not addressed in *Felder* or *Howlett* that will be created if the Idaho Supreme Court is allowed to dismiss an immediate appeal of denial of a qualified immunity motion – the lack of a level playing field between § 1983 plaintiffs and § 1983 defendants. Dismissal of an immediate appeal following a trial court denial of a qualified immunity motion places § 1983 defendants sued in state court at a distinctively unfair disadvantage relative to § 1983 plaintiffs. Defendants lose the benefit of their most important federal defense merely because of the forum in which the action is entertained, while under *Felder* and *Howlett* all elements of plaintiffs' federal claims are protected regardless of state rules of law that might otherwise benefit defendants. The principles articulated in *Felder* and *Howlett* should apply neutrally to both plaintiffs and defendants. State procedures are pre-empted to protect the elements of the federal claim, so State procedures should also be pre-empted to protect the benefits of a federal defense. Petitioners ask only that *Felder* and *Howlett* not be applied in a one-sided manner, but that both § 1983 plaintiffs and defendants benefit from their holdings.

CONCLUSION

The Court should:

(a) hold that Petitioners have a right to appeal to the Idaho Supreme Court from the Idaho district court's denial of their qualified immunity motion in a case brought under 42 U.S.C. § 1983,

(b) reverse the Idaho Supreme Court's order dismissing Petitioners' appeal from the Idaho district court's denial of their qualified immunity motion, and

(c) remand the case to the Idaho Supreme Court for proceedings consistent with the Court's holding.

Respectfully submitted,

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APPENDIX I

Examples of Reported Appellate Decisions of the Fifty States and the District of Columbia in Which the Appellate Court Considered Issues Under 42 U.S.C. § 1983

Alabama: *Boyett by Boyett v. Tomberlin*, 678 So. 2d 124 (Ala. Civ. App. 1995), *cert. denied* (1996).

Alaska: *Hildebrandt v. City of Fairbanks*, 863 P.2d 240 (Alaska 1993).

Arkansas: *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992).

Arizona: *Kerr v. Waddell*, 185 Ariz. 457, 916 P.2d 1173 (Ariz.Ct.App. 1996).

California: *Martinez v. County of Los Angeles*, 47 Cal. App. 4th 334, 54 Cal. Rptr. 2d 772 (1996).

Colorado: *Freedom from Religion Foundation, Inc. v. Romer*, 921 P.2d 84 (Colo.Ct.App. 1996).

Connecticut: *Jones v. Forst*, 41 Conn. App. 341, 675 A.2d 922 (1996).

Delaware: *Heaney v. New Castle County*, 672 A.2d 11 (Del. 1995).

District of Columbia: *Walton v. District of Columbia*, 670 A.2d 1346 (D.C. App. 1996).

Florida: *Jacobi v. City of Miami Beach*, 678 So. 2d 1365 (Fla.Dist.Ct.App. 1996).

Georgia: *Mattox v. Bailey*, 221 Ga. App. 546, 472 S.E.2d 130 (1996).

Hawai'i: *Aged Hawaiians v. Hawaiian Homes Com'n*, 78 Hawai'i 192, 891 P.2d 279 (1995), *cert. denied* ___ U.S. ___, 116 S. Ct. 77, 133 L. Ed. 2d 36 (1995).

Idaho: *Rincover v. Department of Finance*, 128 Idaho 653, 917 P.2d 1293 (1996).

Illinois: *Grassini v. DuPage Tp.*, 279 Ill. App. 3d 614, 665 N.E.2d 860 (1996).

Indiana: *Myers v. Moyars*, 667 N.E.2d 1120 (Ind.Ct.App. 1996).

Iowa: *Teague v. Mosley*, 552 N.W.2d 646 (Iowa 1996).

Kansas: *Sheila A. by Balloun v. Whiteman*, 259 Kan. 549, 913 P.2d 181 (1996).

Kentucky: *Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584 (Ky.Ct.App. 1996).

Louisiana: *Blanchard v. City Parish of East Baton Rouge*, 674 So. 2d 317 (La.App. 1996), *writ denied*, 679 So. 2d 443 (La. 1996).

Maine: *Rippett v. Bemis*, 672 A.2d 82 (Me. 1996).

Maryland: *Maryland Reclamation Associates, Inc. v. Harford County*, 342 Md. 476, 677 A.2d 567 (1996).

Massachusetts: *Parsons v. Mobile Home Park Rent Control Bd. of Chicopee*, 423 Mass. 631, 670 N.E.2d 179 (1996).

Michigan: *Steele v. Department of Corrections*, 215 Mich. App. 710, 546 N.W.2d 725 (1996).

Minnesota: *Carter v. Peace Officers Standards and Training Bd.*, 547 N.W.2d 431 (Minn.Ct.App. 1996).

Mississippi: *Bilbo v. Thigpen*, 647 So. 2d 678 (Miss. 1994).

Missouri: *Moore v. City of Park Hills*, 924 S.W.2d 301 (Mo.Ct.App. 1996).

Montana: *ISC Distributors, Inc. v. Trevor*, 273 Mont. 185, 903 P.2d 170 (1995).

Nebraska: *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994).

Nevada: *Cummings v. Charter Hosp. of Las Vegas, Inc.*, 111 Nev. 639, 896 P.2d 1137 (1995).

New Hampshire: *Kerouac v. Town of Hollis*, 139 N.H. 554, 660 A.2d 1080 (1995).

New Jersey: *C.P. by J.P. v. Township of Piscataway Bd. of Educ.*, 293 N.J. Super. 421, 681 A.2d 105 (1996).

New Mexico: *Silva v. Town of Springer*, 121 N.M. 428, 912 P.2d 304 (Ct. App. 1996), *cert. denied*, 121 N.M. 375, 911 P.2d 883, and 121 N.M. 444, 913 P.2d 251 (1996) (table).

New York: *Sager v. Rochester General Hosp.*, 647 N.Y.S.2d 408 (N.Y. Sup Ct. 1996).

North Carolina: *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 471 S.E.2d 342 (1996).

North Dakota: *Frey v. City of Jamestown*, 548 N.W.2d 784 (1996).

Ohio: *Piphus v. Blum*, 108 Ohio App. 3d 218, 670 N.E.2d 518 (1995).

Oklahoma: *Washington v. State ex rel. Dept. of Corrections*, 915 P.2d 359 (Okla. 1996).

Oregon: *Butler v. State, Dept. of Corrections*, 138 Or. App. 190, 909 P.2d 163 (1995).

Pennsylvania: *Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Bd. of Tp. of O'Hara*, 676 A.2d 1255 (Pa.Commw.Ct. 1996).

Rhode Island: *Dyson v. City of Pawtucket*, 670 A.2d 233 (R.I. 1996), *cert denied*, ___ U.S. ___, 116 S. Ct. 1682, 134 L. Ed. 2d 784 (1996).

South Carolina: *Brown v. Evatt*, 470 S.E.2d 848 (S.C. 1996).

South Dakota: *Wolff v. Secretary of South Dakota Game, Fish and Parks Dept.*, 544 N.W.2d 531 (S.D. 1996).

Tennessee: *Davis v. McClaran*, 909 S.W.2d 412 (Tenn. 1995), *cert. denied*, ___ U.S. ___ 116 S. Ct. 1370, 134 L. Ed. 2d 535 (1996).

Texas: *Emerson v. Borland*, 927 S.W.2d 709 (Tex.Ct.App. 1996).

Utah: *E.M. Through S.M. v. Briggs*, 922 P.2d 754 (Utah 1996).

Vermont: *Hebert v. State*, 679 A.2d 887 (Vt. 1996).

Virginia: *Glasco v. Ballard*, 249 Va. 61, 452 S.E.2d 854 (1995).

Washington: *Kalmas v. Wagner*, 82 Wash. App. 105, 915 P.2d 546 (1996).

West Virginia: *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

Wisconsin: *Gray v. Marinette County*, 546 N.W.2d 553 (Wis.Ct.App. 1996), *review denied*, 549 N.W.2d 735 (Wis. 1996) (table).

Wyoming: *Johnson v. Griffin*, 922 P.2d 860 (Wyo. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 402, 136 L. Ed. 2d ___ (1996).

APPENDIX II

Examples of Procedural Statutes, Rules or Case Law in Which the Appellate Courts of the Fifty States and the District of Columbia Consider on Appeal Pre-Judgment Interlocutory Orders

Alabama: See Alabama Code § 12-1-11 Contempt; appeal of order (order of contempt appealable); § 12-22-21 Statute of limitations (appeal may be taken for a variety of judgments or interlocutory orders in probate matters); Alabama Rules of Appellate Procedure 4(a)(1) (refers to both appealable judgments and orders); *Ex parte Franklin County Dept. of Human Resources*, 674 So. 2d 1277 (Ala. 1996) (writ on mandamus used to review denial of qualified immunity motion in § 1983 case); *Titan Indem. Co. v. Riley*, 679 So. 2d 701 (Ala. 1996) (interlocutory appeal taken to decide scope of insurance coverage before trial).

Alaska: See Alaska Statutes § 09.25.330. Order subject to review (order denying claim of privilege of public officials or reporters shall be subject to review); Alaska Rules of Appellate Procedure, Rule 204(b), as adopted by Laws 1995, c. 79, § 17, effective July 1, 1995, as amended by the Alaska Supreme Court, effective July 15, 1996 (refers to party appealing from a final *order* or judgment.); Alaska Rules of Appellate Procedure, Rule 210(c)(2)(ii) (refers to the judgment or interlocutory order from which the appeal is taken); *State v. 4.62 Acres, More or Less*, 704 P.2d 1340 (Alaska 1985) (interlocutory appeal granted from order that state must conduct exploratory drilling on property that it proposed to condemn to see whether property held gold deposits).

Arizona: See Arizona Statute § 12-2101. Judgments and orders which may be appealed (several categories of appealable interlocutory orders listed, including

"[f]rom any order affecting a substantial right made in any action when the order in effect determines the action and prevents judgment from which an appeal might be taken, and from orders granting or denying a new trial, granting or denying an injunction, dissolving or refusing to dissolve an attachment or a garnishment, etc.); *Henke v. Superior Court of State of Ariz. In and For County of Maricopa*, 161 Ariz. 96, 100, 775 P.2d 1160, 1164 (Ariz. App. 1989) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

Arkansas: See Arkansas Rules of Appellate Procedure – Civil, Rule 2(a) (appeal "may be taken from 1. [a] final judgment *or decree* entered by the trial court"; "4. [a]n order which strikes out an answer, or any part of an answer, or any pleading in an action;" and several other categories of interlocutory orders); *Virden v. Roper*, 302 Ark. 125, 128, 788 S.W.2d 470, 472 (1990) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

California: See California Code of Civil Procedure 904.1 Superior Courts; Appealable Judgments and Orders (orders granting a motion to quash service, motion to dismiss for forum non-conviens, a new trial, etc., all made appealable); *Samuel v. Stevedoring Services of America*, 24 Cal. App. 4th 414, 417-18, 422-23, 29 Cal. Rptr. 2d 420, 422-23, 425-26 (1994), *review denied* (California court of appeals acknowledges state law collateral order doctrine of appealability of orders that "direct the payment of money by appellant or the performance of an act by or against him [or her]," but rejects application of collateral order doctrine based upon a federal law claim of immunity from

suit in motion to dismiss (although it may be available at judgment on the pleadings or summary judgment stage of proceedings)).

Colorado: See Colorado Rev. Stat. § 16-12-102(2) (order suppressing evidence or a confession is immediately appealable); Colorado Appellate Rule 4 (allows an appeal from a final judgment, decree or order); *City of Lakewood v. Brace*, ___ Colo. ___, ___, 919 P.2d 231, 241 (1996) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases by virtue of Supremacy Clause).

Connecticut: See *State v. Bell*, 179 Conn. 98, 425 A.2d 574 (1979) (applying collateral order doctrine to determine that trial court's determination that juvenile should be tried as adult and not as youthful offender was appealable order because that order conclusively determines rights of parties and further proceedings cannot affect them).

Delaware: See Rules of the Supreme Court, Rule 42 (allows an interlocutory appeal if the trial court determines a substantial issue, establishes a legal right and one or more of the enumerated criteria are met); *Gannett Co., Inc. v. State*, 565 A.2d 895, 899 (1989) (collateral order doctrine applied to review order holding journalist in contempt in criminal proceeding).

District of Columbia: See District of Columbia Code 11-721(a)(1) (court of appeals has jurisdiction over appeals from "final orders and judgments" and from certain interlocutory orders regarding injunctions, receivers, and real property); Rules of the District of Columbia Court of Appeal, Rule 5 (interlocutory appeal by permission, if it will materially advance the litigation); *Bible Way Church of Our Lord Jesus Christ of Apostolic Faith of Washington, D.C. v. Beards*, 680 A.2d 419, 425 (D.C. App. 1996) (collateral order

doctrine recognized to apply to orders that "have a final and irreparable effect on important rights of the parties" (internal punctuation omitted)).

Florida: See Rule of Appellate Procedure 9.110(3) (review of orders granting a new trial in civil or criminal case); Rule 9.140 (appeal may be had from orders suppressing confessions or evidence obtained by search and seizure or adjudicating a defendant incompetent or insane); *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

Georgia: See Rules of the Court of Appeals, Rule 30 (appeal allowed if issue is dispositive of the case, order appears erroneous and will probably cause a substantial error at trial or the establishment of precedent is desirable); *Moore v. Bank of Fitzgerald*, 266 Ga. 190, 191, 465 S.E.2d 445, 446 (1996) (cancellation of notice of lis pendens is collateral order from which immediate appeal may be taken).

Hawai'i: See Hawai'i Revised Statutes 804-51 (providing for appeal from forfeiture of bond in criminal case); Hawai'i Rules of Appellate Procedure, Rule 34 (formal testacy orders and Rule 54(b) certified orders are appealable); *Shimote v. Vincent*, 80 Hawai'i 96, 905 P.2d 71 (Haw. App. 1995), *cert. denied*, 80 Hawai'i 187, 907 P.2d 773 (Haw. 1995) (order denying motion to stay trial pending arbitration is appealable collateral order).

Idaho: See Idaho Appellate Rule 11 (final judgments, orders and decrees appealable and also orders granting a new trial, suppressing evidence or reducing a criminal charge over the prosecutor's objection); Rule 12 (appeal by permission from interlocutory orders which involve a controlling question of law

about which there is substantial grounds for difference of opinion and in which an immediate appeal will materially advance the orderly resolution of the litigation); *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986) (plaintiff brought interlocutory appeal from district court's order to submit to remittitur of jury verdict or to new trial).

Illinois: See Illinois Const. Art. VI, § 6 Appellate Court Jurisdiction (final judgments are appealable as a matter of right and "[t]he Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts"); Illinois Civil Appeals Rules 306 (permissive appeal from interlocutory orders granting a new trial, from various orders on venue, from disqualification of attorney, etc.), 307 (appeal as matter or right from certain interlocutory orders regarding injunctions, appointment of receivers, possession of property, terminating parental rights in adoption proceedings, etc.); 308 (permissive appeal of interlocutory orders that "involve[ ] a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation"); *Doe v. Doe*, 282 Ill.App.3d 1078, 668 N.E.2d 1160 (1996) (trial court order prohibiting plaintiff from disclosing her name or defendant's name in any pleading is appealable interlocutory order because it is an injunction).

Indiana: See Indiana Code § 35-38-4-2(6) and Appellate Rule 4B(6) (appeal from an interlocutory order if the appellate court finds on petition and the trial court certifies that the appellant will suffer substantial injury or expense if the appeal is delayed, the order determines a substantial question of law, the early

determination of which will promote orderly disposition of the case or the remedy by appeal after judgment is otherwise inadequate); *American Cyanamid Co. v. Stephen*, 600 N.E.2d 1387, 1388 (Ind. App. 1992), *transfer denied* (class certification orders are final and appealable collateral orders – finality is determined by case law and rules).

Iowa: See Iowa Rules of Appellate Procedure, Rule 1 (appellate review of order granting new trial); Rule 2 (permissive appeal of interlocutory order if ruling involves substantial rights, will materially impact a final decision and a determination before trial will better serve the interests of justice); *Kulish v. West Side Unlimited Corp.*, 545 N.W.2d 860 (Iowa 1996) (interlocutory appeal granted to consider dismissal of parents' claim of loss of consortium in wrongful death case).

Kansas: See Kansas Stat. Ann. § 22-3603 (state can appeal an order quashing a search warrant, suppressing evidence or suppressing a confession); § 60-2102 (appeal as a matter or right from certain orders regarding provisional remedies, injunctions, or receiverships, and from "final decisions"); *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 584, 781 P.2d 1099, 1103-04 (1989) ("final decision" language of Kansas statute identical to federal appellate statute, and order disqualifying attorney was final decision under collateral order doctrine under Kansas law and immediately appealable).

Kentucky: See Kentucky Revised Statutes 22A.020 Jurisdiction; Appeal Procedures (appeal may be taken as a matter or right from "any conviction, final judgment, order or decree" and "interlocutory orders . . . in civil cases [may be reviewed] as authorized by rules promulgated by the Supreme Court"); 416.620

Trial of Exceptions to Interlocutory Judgment; Questions as to Compensation to Be Tried by Jury; Appeals (authorizes appeal from interlocutory order allowing petitioner to take possession of property in condemnation proceedings); *Commonwealth v. Smith*, 898 S.W.2d 496 (Ky.App. 1995) (interlocutory appeal from suppression of evidence); *Ratliff v. Fiscall Court of Caldwell County*, 617 S.W.2d 36 (Ky. 1981) (condemnee has right to appeal interlocutory order giving condemnor right to take property).

Louisiana: See Louisiana Code Civ. Proc. art. 2083 (proceedings in appellate courts) (an appeal may be taken "from an interlocutory judgment which may cause irreparable injury"); *Butler v. Overnite Transp. Co., Inc.*, 444 So. 2d 676 (La. App. 1984) (court applied collateral order doctrine and analysis to hold that interlocutory order to pay attorney's fees was reviewable under this provision of art. 2083).

Maine: See 4 Maine Revised Statutes § 57 Jurisdiction; disposition of cases; technical errors in pleading and procedure (The Supreme Judicial Court's jurisdiction includes "questions of law arising on reports of cases, including interlocutory orders or rulings of such importance as to require, in the opinion of the justice, review by the law court before any further proceedings in the action"); *Vogt v. Churchill*, 679 A.2d 522, 524 (Me. 1996) (collateral order exception allows appeal from order granting or denying an attachment); *Lyons v. City of Lewiston*, 666 A.2d 95, 99 (Me. 1995) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases and Maine rules of procedure held inapplicable).

Maryland: See Maryland [Cts. & Jud. Proc.] Code Ann. § 12-303(3)(iii) (order denying interlocutory injunction is immediately appealable); *Montgomery County*

v. Stevens, 337 Md. 471, 476, 654 A.2d 877, 879 (1995) (issue whether high ranking officer of county was subject to deposition appealable under collateral order doctrine); *Parrott v. State*, 301 Md. 411, 483 A.2d 68 (1984) (Maryland applies collateral order doctrine to constitutional rights).

Massachusetts: See Rules of Criminal Procedure, Rule 15 (either side can appeal to a single justice from a determination regarding the suppression of evidence, state can appeal the denial of a transfer of a delinquency proceeding); *Breault v. Chairman of Bd. of Fire Com'rs of Springfield*, 401 Mass. 26, 31, 513 N.E.2d 1277, 1280-81 (1987), cert. denied sub nom. *Forastiere v. Breault*, 485 U.S. 906, 108 S. Ct. 1078, 99 L. Ed. 2d 237 (1988) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

Michigan: See Michigan Compiled Laws 600.308. Court of appeals; jurisdiction (court of appeals has jurisdiction of orders of probate court made appealable by probate code); Michigan Court Rule 7.205 (permissive appeal to the court of appeals from interlocutory order if appellant would suffer substantial harm by awaiting final judgment); *Carleton Sportsman's Club v. Exeter Tp.*, 217 Mich. App. 195, 550 N.W.2d 867 (1996) (interlocutory appeal granted to clarify the law of appeal from certain zoning decisions).

Minnesota: See Rules of Civil Appellate Procedure, Rule 103.03 (appeal to court of appeals allowed from order that grants, refuses or dissolves an injunction, grants a new trial, if new trial is based on error in law, or denies a summary judgment or motion to dismiss, if the trial judge certifies that the question presented is important and doubtful); *Anderson v. City of Hopkins*, 393 N.W.2d 363, 364 (Minn. 1986) (collateral order doctrine adopted for review of

denial of qualified immunity motions in § 1983 cases).

Mississippi: See Miss. Rules of Appellate Procedure, Rule 5 (permissive review of interlocutory order if a substantial basis exists for difference of opinion on a question of law and review will materially advance the litigation or protect a party from substantial harm or resolve an issue of general importance to the administration of justice); *Beckwith v. State*, 615 So. 2d 1134, 1140-41 (Miss. 1992), *cert. denied*, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993) (court reviews its precedents that collateral order doctrine is applied in three kinds of criminal cases: denial of motion to reduce bond, to dismiss on double jeopardy grounds, and to dismiss on speech and debate grounds).

Missouri: See Vernon's Annotated Missouri Statutes 512.020. Who may appeal (appeal allowed from order granting a new trial and certain orders regarding injunctions); *State v. Smith*, 926 S.W.2d 689 (Mo. App. 1996) (interlocutory appeal from suppression of evidence).

Montana: See Montana Rule of Appellate Procedure, Rule 1 (appeal from an order granting a new trial, refusing to permit a class action, granting or refusing to grant an injunction, changing or refusing to change county in which case will be tried, ordering delivery or transfer of property, appointing or refusing to appoint a receiver, or, in partition actions, an order determining the rights of the parties); Mont. Code Ann. § 46-20-103 (state can appeal from order granting a new trial, quashing an arrest or search warrant or suppressing evidence or a confession); *McDonald v. Washington*, 261 Mont. 392, 862 P.2d 1150 (1993) (interlocutory appeal taken from class certification order).

Nebraska: See Nebraska Rev. Stat. § 29-116 (state can appeal order suppressing statements); Nebraska Rev. Stat. § 29-824 (state can appeal order suppressing evidence); Nebraska Rev. Stat. § 25-1902 (final order defined to include "[a]n order affecting a substantial right in an action"); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990) (section 25-1902 construed to make collateral orders appealable).

Nevada: See Nevada Rules of Appellate Procedure, Rule 3A (appeal of order granting a new trial, granting or refusing an injunction, appointing or refusing to appoint a receiver, changing or refusing to change the place of trial, or resolving rights in a partition action); *Consumers League of Nevada v. Southwest Gas Corp.*, 94 Nev. 153, 576 P.2d 737 (1978) (interlocutory appeal allowed from order denying consumer's request for attorneys' fees in connection with public utility rate refund).

New Hampshire: See Supreme Court Rules, Rule 8 (Supreme Court may accept an interlocutory appeal involving a question of law where there is a substantial basis for disagreement and interlocutory review would materially advance the litigation); *Richardsons v. Chevrefils*, 131 N.H. 227, 231-32, 552 A.2d 89, 92 (1988) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases).

New Jersey: See Rules Governing Appellate Practice 2:2-4 (appellate division may grant leave to appeal interlocutory order in the interest of justice); Rules Governing Civil Practice 4:42-2 (appeal following certification by trial judge when there is no just reason for delay); Rules Governing Civil Practice 4:53-1 (order appointing receiver is final for purposes of appeal); Rules Governing Practice in the Chancery Division 5:8-6 (final custody order in

bifurcated family action); and Rule 5:10-6(order entered on preliminary hearing on adoption); *Elmora Hebrew Center, Inc. v. Fishman*, 125 N.J. 404, 593 A.2d 725 (1991) (court explains that interlocutory appeal taken to determine which part of controversy was religious and which part contractual).

New Mexico: See Rules of Appellate Procedure, Rule 12-203 (interlocutory appeal allowed on controlling issue of law where there is a substantial basis for difference of opinion and immediate appeal would materially advance the ultimate determination); *Carrillo v. Rostro*, 114 N.M. 607, 615, 845 P.2d 130, 137 (1992) (collateral order doctrine adopted for review of denial of qualified immunity motions in § 1983 cases)

New York: See New York Const., Art. VI, § 6 ("The jurisdiction of the court of appeals shall be limited to the review of questions of law . . . , or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved"); McKinney's Criminal Procedure Law § 450.20 (orders reducing counts of indictment or suppressing evidence immediately appealable); *Zack v. Zack*, 183 A.D.2d 382, 590 N.Y.S.2d 632 (1992) (immediate appeal allowed over interlocutory divorce judgment).

North Carolina: See North Carolina Statute 7A-27 Appeals of right from the courts of the trial divisions (interlocutory orders that "affect[ ] a substantial right" and that grant or refuse a new trial are appealable as of right); *Corum v. University of North Carolina through Bd. of Governors*, 330 N.C. 761, 767, 413 S.E.2d

276, 280, *cert. denied*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431, (1992) (*Mitchell* cited for review of denial of qualified immunity motions in § 1983 cases).

North Dakota: See North Dakota Century Code § 28-27-02 (appealable orders include "[a]n order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;" orders granting or denying injunctions or new trials; and "[a]n order which involves the merits of an action or some part thereof;"); *Jarmin v. Shriners Hospitals for Crippled Children*, 450 N.W.2d 750, 751, n.3 (N.D. 1990) (order removing petitioner from position as personal representative of estate is appealable because it is independent of proceeding for final accounting).

Ohio: See Ohio Revised Code § 2505.02 (orders vacating judgment or granting new trial are final orders appealable as of right) § 2505.03 ("[e]very final order, judgment, or decree . . . may be reviewed on appeal"); *In re Adoption of Greer*, 70 Ohio St. 3d 293, 293, 297, 638 N.E.2d 999, 1000, 1003 (1994) (order finding that putative father's consent was not necessary before taking up adoption petition was appealable interlocutory order because it precluded putative father from barring adoption).

Oklahoma: See 12 Oklahoma Statutes 952 (final orders, certain orders vacating provisional remedies, orders granting or denying injunctions, and orders granting or denying new trials are all appealable orders); *McLin v. Trimble*, 795 P.2d 1035, 1040 (Okla. 1990) (Supremacy Clause cited for decision to review denial of qualified immunity motions in § 1983 cases by original action in appellate court).

Oregon: See Oregon Revised Statutes § 19.010 (appealable judgments, decrees, and orders include interlocutory decrees for partition or sale of real property and orders granting new trial); *State v. Wright*, 97 Or. App. 401, 405, 776 P.2d 1294, 1297 (1989), review denied, 308 Or. 593, 784 P.2d 1100 (1989) (Table) (State may appeal pre-trial order to admit evidence under statute addressing admissibility of evidence of victim's past sexual behavior); *Vista Management, Ltd. v. Cooper*, 81 Or. App. 660, 662, 726 P.2d 974, 976 (1986) (judgment on foreclosure before final determination of related contract issues, although called interlocutory, is final order for purposes of appeal).

Pennsylvania: See Pennsylvania Rules of Appellate Procedure 313 ("An appeal may be taken as of right from a collateral order of an administrative agency or lower court."); *Hanson v. Federal Signal Corp.*, ___ Pa. Super. ___, ___, 679 A.2d 785, 787 (Pa. Super. 1996) (order denying class certification appealable under collateral order doctrine).

Rhode Island: See General Laws of Rhode Island 9-24-7 (appeal may be taken for orders granting an injunction, appointing a receiver, ordering sale of real or personal property, or ordering a new trial); *Thompson v. Thompson*, 642 A.2d 1160, 1161 (R.I. 1994) (interlocutory order in divorce proceeding awarding property, alimony, health insurance coverage and attorney's fees is appealable); *Silva v. Perkins Mach. Co.*, 622 A.2d 443, 444 (R.I. 1993) (denial of attorney's motion to withdraw from case is appealable interlocutory order).

South Carolina: See South Carolina Code of Laws § 14-3-330 (orders granting or denying a new trial, striking an answer or any part of it, granting or denying an injunction, or refusing the appointment

of a receiver are appealable); South Carolina Appellate Court Rule 201 (appeals may be taken from any final judgment or appealable order); *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) (interlocutory orders regarding mode of trial – whether issue is one of law and presented to jury or one of equity and decided by judge – are immediately appealable).

South Dakota: See South Dakota Code § 15-26A-3 (orders granting new trial and granting or refusing an injunction are immediately appealable); *Green v. Clinic Masters, Inc.*, 272 N.W.2d 813 (S.D. 1978) (court hears appeal as right from interlocutory order granting injunction).

Tennessee: See Tennessee Rule of Appellate Procedure 3 (in criminal cases state may appeal from dismissal of indictment and remanding matter to juvenile court); *Fann v. Brailey*, 841 S.W.2d 833, 834 (Tenn. App. 1992), *appeal denied* (court considers appeal from denial of qualified immunity motion in § 1983 case even though order is not ordinarily appealable under local rule).

Texas: See Vernon's Texas Statutes and Codes, Civil Practice and Remedies Code § 51.014 (interlocutory orders appointing receiver, certifying or refusing to certify a class, granting or refusing an injunction, denying a government officer or employee's claim of immunity, or denying certain free speech/free press claims are appealable); Code of Criminal Procedure Art. 44.01 (state may appeal from orders dismissing any portion of an indictment, granting a new trial, and suppressing evidence); *Robinett v. Carlisle*, 928 S.W.2d 623 (Tex. App. 1996), application for writ of error pending (interlocutory appeal from denial of qualified immunity motion taken under § 51.014).

Utah: See Utah Rule of Criminal Procedure 26 (appeal may be taken from order suppressing evidence); *Bellonio v. Salt Lake City Corp.*, 911 P.2d 1294 (Utah App. 1996), *cert. denied*, 917 P.2d 556 (Utah 1996) (Table) (interlocutory appeal from trial court order denying municipality's motion to dismiss for failure to comply with tort claim filing requirements).

Vermont: See Vermont Rule of Appellate Procedure 5.1 (sets forth procedure to initiate appeal of collateral orders by motion before trial court); *Murray v. White*, 155 Vt. 621, 625-26, 587 A.2d 975, 977-78 (1991) (court applies collateral order analysis to rule that denial of qualified immunity motion in § 1983 case is appealable order).

Virginia: Code of Virginia § 8.01-626 (appeal available from grant or denial of injunction); § 19.2-398 (commonwealth may appeal dismissal of indictment or suppression of evidence); *Commonwealth v. Ramey*, 19 Va. App. 300, 450 S.E.2d 775 (1994) (statute giving commonwealth interlocutory right of appeal is not unconstitutional).

Washington: See Washington Rule of Appellate Procedure 2 (orders of public use and necessity in condemnation cases, orders granting or denying a motion for a new trial, and orders suppressing evidence all appealable); *State v. Ortiz*, 104 Wash. 2d 479, 706 P.2d 1069 (1985), *cert. denied*, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986) (opinion describes interlocutory appeals that preceded trial).

West Virginia: See West Virginia Code § 58-5-1 (appeal lies from final judgments, orders, or decrees, from orders dissolving or refusing to dissolve injunctions, from orders quashing or abating or refusing to quash or abate an attachment, and from orders granting a new trial); *Mitchem v. Melton*, 167 W. Va. 21, 29-32, 277 S.E.2d 895, 899-901 (1981) (case reviews several

categories of appealable interlocutory orders to hold that order refusing to certify a class in a § 1983 suit is an appealable order).

Wisconsin: See Wisconsin Statutes 808.03 (final judgments and final orders appealable as of right; interlocutory appeal allowed if appeal would materially advance the litigation or protect the petitioner from substantial or irreparable harm or clarify an issue of general importance in the administration of justice); *State v. Schoepp*, 554 N.W.2d 236 (Wis. App. 1996) (interlocutory appeal from order granting state's motion to quash defendant's subpoenas).

Wyoming: See Wyoming Rules of Appellate Procedure 1.05 (appealable orders include orders granting a new trial, granting or dissolving injunctions, appointing receivers); 13.02 (allows interlocutory appeals that involve controlling issue of law as to which there is a substantial basis for difference or opinion and in which an immediate appeal materially advances the litigation); *Park County v. Cooney*, 845 P.2d 346, 349 (Wyo. 1992), *cert. denied*, 510 U.S. 813, 114 S. Ct. 60, 126 L. Ed. 2d 30 (1993) (*Mitchell* cited for court's holding that denial of qualified immunity motion in § 1983 case is appealable order, even though denial of motion is not ordinarily appealable in other contexts).